105

(5)

No. 07-1512

Supreme Court, U.S.
FILED
SEP 0 9 2008
OFFICE OF THE CLERK

In the Supreme Court of the United States

ROBERT J. LUCAS, JR., *ET AL.*, PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

PHILLIP A. WITTMANN
DARIA BURGESS DIAZ
Stone Pigman Walther Wittman LLC
546 Carondelet Street
New Orleans, LA 70130
(504) 581-3200

GENE C. SCHAERR
Counsel of Record
JOHN FEHRENBACH
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
(202) 282-5000

STUART ALTSCHULER
LINDA T. COBERLY
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

Counsel for Petitioners
[Additional counsel listed on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TIM C. HOLLEMAN
Boyce Holleman & Associates
11240 Hwy 49 N., Ste. 400-D
Gulfport, MS 39503
(228) 539-6000

W. F. HOLDER II
400 East Railroad St.
Long Beach, MS 39560
228-863-4999

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

CONCLUSION 11

TABLE OF AUTHORITIES

PAGE(S)

CASES

Bell v. *United States*,
349 U.S. 81 (1955) 10

Gratz v. *Bollinger*,
539 U.S. 244 (2003) 4

Grutter v. *Bollinger*,
539 U.S. 306 (2003) 4

Leo Sheep Co. v. *United States*,
440 U.S. 668 (1979) 3

Quanta v. *LG Electronics*,
128 S. Ct. 2109 (2008) 3

Rapanos v. *United States*,
547 U.S. 715 (2006) ..... *passim*

Simsbury-Avon Preservation Soc., LLC v.
Metacon Gun Club, Inc.,
472 F. Supp. 2d 219 (D. Conn. 2007) 8

Smith v. *Wade*,
461 U.S. 30 (1983) 10

Solid Waste Agency v. *U.S. Army Corps of Engineers*,
531 U.S. 159 (2001) 1, 2

United States v. *Bass*,
404 U.S. 336 (1971) 9

United States v. *Johnson*,
467 F.3d 56 (1st Cir. 2006) (Torruella, J. dissenting) 7

United States v. *Lanier*,
520 U.S. 259 (1997) 10

United States v. *McWane, Inc.* (No. 08-223)
(filed August 21, 2008) ..... *passim*

United States v. *Robison*,
505 F.3d 1208 (11th Cir. 2007) 8

United States v. *Santos*,
128 S. Ct. 2020 (U.S. 2008) 10

Virginia v. *Black*,
538 U.S. 343 (2003) 3

OTHER AUTHORITIES

American Heritage Dictionary of the English Language (4th Ed. 2006) 7

Congr. Res. Service, *Report for Congress, The Wetlands Coverage of the Clean Water Act Is Revisited by the Supreme Court: Rapanos* v. *United States* (Jan. 3. 2007). 3, 7

INTRODUCTION

The Government acknowledges that the issue of "the standard or standards to be used in determining" the coverage of the Clean Water Act (CWA) "under the fractured decision in *Rapanos*"—the fundamental question presented in this case—is the subject of "an acknowledged circuit conflict" and otherwise "a matter of exceptional importance." No. 08-223, *United States* v. *McWane, Inc.* (filed August 21, 2008), at 14-15 & 30n.7; *accord* Opp. 14. The Government also does not dispute that *this* case offers the Court a fair opportunity to resolve that issue and bring needed clarification to the scope of federal jurisdiction under the CWA. The Government, however, argues that *McWane* is "a *more suitable* vehicle" solely because the Fifth Circuit in this case held the evidence sufficient to satisfy the legal standards articulated by both the *Rapanos* plurality and the concurrence, whereas the Eleventh Circuit in *McWane* stated that there the difference between the plurality and concurrence in *Rapanos* "*may* be outcome-determinative." *Id.* at 31 n. 7 (emphases added).

This Court, of course, need not choose between these two "suitable vehicles": It can simply grant both petitions, as it did in *Rapanos*. In so doing, the Court can ensure that *one* of the cases before it (this one) arises in the context of wetlands regulation, which—as *Rapanos*, *SWANCC*, and *Riverside Bayview Homes* confirm—is both more recurring and of greater concern from a constitutional and policy standpoint than the regulation of direct discharges into flowing "open water." By granting both petitions, moreover, the Court can ensure that *one* of the Government's opponents—petitioners here—will vig-

orously urge adoption of the *Rapanos* plurality. But even if the Court felt compelled to choose between the two cases, this case, not *McWane*, would provide a more suitable vehicle to resolve the question presented in both petitions, while at the same time allowing the Court to decide two additional questions that are likewise of exceptional importance to property owners nationwide.

ARGUMENT

If the Court is going to expend the resources to determine which of the *Rapanos* opinions provides the controlling standard—as it well should—the Court will undoubtedly want to provide additional guidance on the proper *application* of whichever standard the Court chooses. Such additional guidance may even prove helpful (and perhaps crucial) to the Court's ability to reach a majority position. Yet in these respects, *McWane* is less "suitable" than this case.

1. First and foremost, *McWane* involved discharges into an open, flowing body of water—Avondale Creek—rather than, as here, a normally dry "wetland" that the EPA nevertheless considers a "water of the United States." Accordingly, any additional guidance provided in *McWane* about the meaning of the chosen legal standard is less likely to help lower courts determine the scope of federal jurisdiction over wetlands—the very context in which the constitutional and federalism concerns about the CWA are most acute. See, *e.g.*, *Rapanos*, 547 U.S. at 721-22 (Scalia, J., plurality opinion); *id.* at 776 (Kennedy, J., concurrence); *SWANCC*, 531 U.S. at 174 (noting "significant constitutional questions" in the regulation of wetlands).

Federal jurisdiction over wetlands, moreover, implicates far more property, and property owners, than federal jurisdiction over flowing streams. Indeed, the nation has an estimated 100 million acres of wetlands, and approximately 75% of the wetlands in the lower 48 states are on private property. Congr. Res. Service, *Report for Congress, The Wetlands Coverage of the Clean Water Act Is Revisited by the Supreme Court: Rapanos* v. *United States* 6, 10 (Jan. 3. 2007). As a result, unlike flowing streams, there are an enormous number of disputes, in a variety of contexts, involving the federal government's jurisdiction over wetlands. *Id.;* see also *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 678 (1979) ("Because this holding affects property rights in 150 million acres of land * * *, we granted certiorari.").

2. Ironically, the only fact that the Government cites in arguing that this case is less "suitable" for resolving the scope of federal CWA jurisdiction—the fact that the Fifth Circuit purported to apply both the *Rapanos* plurality and the concurrence without deciding which standard controls—is one of the very things that makes this case a superior vehicle.[1] Although the Eleventh Circuit in *McWane* did opine on the meaning of the *Rapanos* plurality (and in a way that conflicts with the Fifth Circuit's decision in this case, see, *infra*, at 8-9), it did not opine on the meaning of the concurrence's "substantial nexus" standard. Indeed, the jury instruction in *McWane* did not attempt

---

[1] Nor is there anything unusual in this Court's granting certiorari to resolve one vexing issue in circumstances that require the Court to also resolve another issue. See, *e.g.*, *Quanta* v. *LG Electronics*, 128 S. Ct. 2109 (2008); *Virginia* v. *Black*, 538 U.S. 343, 363, 367 (2003).

to articulate the "substantial nexus" standard, and the Government's witnesses did not attempt to establish such a nexus. Thus, the Eleventh Circuit simply had no occasion to apply that standard to the facts there.[2]

Here, by contrast, the court of appeals purported to apply both the *Rapanos* plurality's standard and the "substantial nexus" requirement. See Pet. App. 11a-12a. For that reason, this case gives the Court a clearer opportunity, once it has selected the governing standard, to provide needed guidance on the meaning and proper application of that standard.

3. The Government is also incorrect in contending (at 18) that, aside from the first question presented, this petition raises only "factbound challenges" that "implicate no issue of continuing importance." In fact, unlike *McWane*, this case not only gives this Court an opportunity to address the critical issue of whether residential homeowners and developers must obtain *federal* permits to install and operate or-

---

[2] It is, of course, entirely *possible* that the Court could provide additional guidance as to the proper application of the "substantial nexus" standard if it granted the *McWane* petition and ultimately adopted that standard. And it is likely that the Court would provide additional guidance if it decided in *McWane* to adopt the standard of the *Rapanos* plurality. Accordingly, if the Court were to grant review in *McWane*, it should, at a minimum, hold this case pending decision in *McWane*.

On the other hand, if the Court elects to grant both petitions and consider both cases together, it should not consolidate the cases because the interests of the two sets of defendants are not sufficiently aligned to warrant joint briefing and oral argument. See, *e.g.*, *Grutter* v. *Bollinger*, 539 U.S. 306 (2003); *Gratz* v. *Bollinger*, 539 U.S. 244 (2003). The Court should instead simply consider the cases in tandem.

dinary residential septic systems (Pet. Question 3 & 26-33),[3] it also gives the Court an opportunity to address critical *legal* issues in the proper applications of both the *Rapanos* plurality and the concurrence—the subject of the second question presented.

As explained in the petition (at 20-21), the critical *legal* error in the Fifth Circuit's application of the "substantial nexus" standard is its utter failure to require that the connection between the wetland at issue and a traditionally navigable body be "significant" or "substantial"—as the *Rapanos* concurrence expressly requires. *See* 547 U.S. at 780. But the Government simply ignores this problem: It points to nothing in the Fifth Circuit's opinion requiring (or holding) that the alleged, generic effect of these wetlands in "controlling flooding" and "preventing pollution" (Opp. at 16) was "significant" or "substantial." It points to no evidence from which the Fifth Circuit *could* have made such a finding. And it completely ignores the district court's express findings indicating

---

[3] The Government attempts to minimize the significance of the Fifth Circuit's holding on this point primarily by arguing that septic systems are point sources only in "rare circumstance[s]" because they "do not generally discharge pollutants directly into 'waters of the United States.'" Opp. 19. But that argument assumes that the sweeping interpretation of "waters of the United States" that the Government advanced in this case, and in *Rapanos,* is wrong: As the *Rapanos* plurality pointed out, under the Government's interpretation (as under the decision below), virtually "the entire land area of the United States" would constitute "waters of the United States" subject to federal jurisdiction. 547 U.S. at 722. And that of course would mean that vast numbers of residential septic systems *do*, in fact, "discharge pollutants directly into 'waters of the United States.'" Opp. 19.

that no such evidence was ever presented.[4] See Pet. 20-21.

Accordingly, if the Court decides to adopt the *Rapanos* concurrence, this case, unlike *McWane*, presents a clear opportunity to address a clean legal question about the proper application of the concurrence in this and all future cases: Does the CWA require the Government to demonstrate a "significant" or "substantial" effect on a downstream traditionally navigable water, and if so, what does that mean in the wetlands context?

Contrary to the Government's bald assertion (at 15), this is obviously a question of "continuing importance." Indeed, it has bedeviled not only the lower courts, but also the very federal agencies that the Government represents here. See Pet 16n.2 (collect-

---

[4] The Government's assertion (at 5) that, in addition to engaging in discharges in violation of the CWA, petitioners "defrauded hundreds of individuals who purchased house lots ... in reliance on petitioners' false representations that the sites were habitable" is dead wrong. In fact, petitioners' mail fraud convictions were based upon sales of 18 specific home lots (not hundreds), which the Government claimed were wetlands subject to the EPA's jurisdiction, and, largely for that reason, were "uninhabitable." And that is no doubt why the district court repeatedly recognized that *all* of the claims against petitioners, including the mail fraud claims, were premised upon federal jurisdiction under the Clean Water Act. See Pet App. 118a.

The Government, moreover, presented no evidence that any of these lots was "uninhabitable" in fact. To the contrary, as shown in Appendix A, to the extent there was evidence on the habitability of these 18 lots, it showed that they not only *were* habitable, but most were in fact *inhabited* at the time of trial. And those that were vacant at trial had been inhabited for substantial periods and were vacated for reasons unrelated to their habitability. See App. A.

ing cases); *United States* v. *Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) (Torruella, J. dissenting) (criticizing the "significant nexus" test as "opaque"); Congr. Res. Service, *supra*, at Summary ("[T]he outer geographic limit of CWA jurisdiction * * * has challenged regulators, landowners and developers, and policymakers for more than 30 years.").

On the other hand, if the Court adopts the standard embraced by the *Rapanos* plurality, this case presents a clean legal issue about the meaning of that standard as well. As explained in the petition (at 21-25), the critical error in the Fifth Circuit's application of that standard was its assumption that a "continuous" surface connection can be established based on evidence of a connection that, although "continuous" in the spatial sense, is not "continuous" in the temporal sense. That is a flat misinterpretation of the "continuous surface connection" standard, which requires temporal as well as spatial continuity. See 547 U.S. at 742; American Heritage Dictionary of the English Language (4th Ed. 2006) (defining "continuous" as including not just physical continuity, but the quality of being "uninterrupted in time").

Here again, the Government's brief largely ignores this problem. Although the Government claims (at 17n.9) that its evidence established "persistent or perennial flows" between the wetlands and a relatively permanent body of water, the Fifth Circuit never articulated such a requirement, let alone made such a finding. See Pet. App. 11a-12a. And nothing in the Government's description of its own evidence establishes a temporally continuous surface connection between a relatively permanent body of water and these wetlands: The closest the Government

comes is a statement by one of its experts, based upon four visits to the property, that "the *tributaries*" running near the wetlands were "persistent or perennial." Opp. at 17n.9.

Here again, therefore, if the Court decides to adopt the *Rapanos* plurality's standard, this case will provide a clear opportunity to address a clean legal question about the meaning of that standard: Does the CWA require the Government to demonstrate a surface connection between the wetland and a relatively permanent body of water that is "continuous" both spatially and temporally? Or, as the Fifth Circuit assumed, is an intermittent but spatially continuous connection enough?

This too is a question of "continuing importance." *Compare* Opp. 15. Indeed, the same issue arose in *McWane* as a result of the district court's holding that the jury could find that the discharges were made into a "navigable water" even if the body of water into which they were made—Avondale Creek—flowed "only intermittently." *United States* v. *Robison*, 505 F.3d 1208, 1215 (11th Cir. 2007). Contrary to the Fifth Circuit's approach here, the Eleventh Circuit opined that this approach was inconsistent with the *Rapanos* plurality's standard—precisely because that standard requires temporal as well as spatial continuity. *Id.* at 1223-1224; see also, *e.g.*, *Simsbury-Avon Preservation Soc., LLC* v. *Metacon Gun Club, Inc.*, 472 F. Supp. 2d 219, 229 (D. Conn. 2007) ("While plaintiffs have offered evidence showing that a surface water connection does *at times* exist, they offer no evidence demonstrating a continuous connection.") (emphasis added).

In short, the Fifth Circuit's opinion eviscerates the "substantial" component of the "substantial nexus" requirement of the *Rapanos* concurrence, and the court's assumption that a "continuous surface connection" does not require *temporal* continuity makes a mockery of the *Rapanos* plurality. It is therefore hardly surprising that the Government wishes to avoid having to defend the Fifth Circuit's analysis, which is squarely challenged in *petitioner's* version of the second question presented. Compare Pet. i with Opp. I.

4. As a vehicle for resolving the issues presented, this case is also superior to *McWane* because it brings into sharper focus the substantial liberty interests and due process concerns implicated by the Government's expansive interpretation of the CWA. Unlike the individual defendants in *McWane,* who were placed on probation, the individual petitioners here received—and are now serving—substantial prison terms, ranging from seven to nine years. Indeed, unless this Court vacates her conviction, one of the petitioners (Robbie Wrigley) will lose forever the opportunity to raise her son during the first seven years of his life—all because of an expansive interpretation of a law that all concede is ambiguous at best.

This case thus differs from *Rapanos,* which, as it came to this Court, involved only civil remedies, not criminal sanctions. The Court thus had no occasion to consider expressly the due process/fair notice issues presented by criminal prosecutions under a highly ambiguous statute, or the resulting requirement under the rule of lenity that, at least in that context, ambiguities be resolved, not in favor of the Government, but "in favor of the defendant." *United*

States v. *Bass*, 404 U.S. 336, 348 (1971); *see also* See *Smith* v. *Wade*, 461 U.S. 30, 41n.8 (1983) ("[I]n criminal law * * * terms [a]re generally more strictly construed than in civil law."); *United States* v. *Lanier*, 520 U.S. 259, 266-67 (1997); *United States* v. *Santos*, 128 S. Ct. 2020, 2025 (U.S. 2008).

That is also why, although we believe petitioners would likely be vindicated under a proper application of the *Rapanos* concurrence—which the *McWane* defendants will necessarily endorse—we intend to argue on the merits that the *Rapanos* plurality should govern, at least in criminal cases, under the rule of lenity. See, *e.g.*, *Santos*, 128 S. Ct. at 2025 ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."). Certainly the fact that four Justices of this Court concluded that the CWA mandates the "continuous surface connection" requirement means that that interpretation is, at a minimum, a reasonable construction of the statute. See, *e.g.*, *Bell* v. *United States*, 349 U.S. 81, 83 (1955) (applying rule of lenity when the Court could "not unreasonably reach either of the conflicting constructions"). And certainly it is far easier for a landowner to determine in advance whether a wetland on her property has a (temporally and spatially) "continuous surface connection" to a relatively permanent body of water, than to determine whether her wetland bears a "substantial nexus" to a traditionally navigable body of water miles away.

Of course, a decision from this Court that both enforces and clarifies the "substantial nexus" requirement could ameliorate the ambiguity and uncertainty that currently exists under that standard. But at

this point, only the standard of the *Rapanos* plurality is sufficiently concrete and precise to pass muster under the due process principles and canons of construction applicable in the criminal context. And only the petitioners in this case (unlike the respondents in *McWane*) have any meaningful incentive to advocate that standard as controlling.

CONCLUSION

The Government's prosecution of the petitioners—and the Fifth Circuit's decision upholding several novel theories of liability—is unprecedented and, as the Government now admits (at 14), raises issues of "great practical importance." Unlike *McWane*, this case will permit the Court not only to resolve the *Marks* issue on which the courts of appeals are in express conflict, but also to articulate the proper understanding of whichever of the *Rapanos* standards the Court chooses, and to prevent the Government from subjecting virtually all who install or use residential septic systems to potential criminal liability for the resulting discharges.

The petition should be granted, and this case should either be briefed and argued along with *McWane*, or decided on its own.

Respectfully submitted,

PHILLIP A. WITTMANN
DARIA BURGESS DIAZ
Stone Pigman Walther Wittman LLC
546 Carondelet Street
New Orleans, LA 70130
(504) 581-3200

GENE C. SCHAERR
Counsel of Record
JOHN FEHRENBACH
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
(202) 282-5000

STUART ALTSCHULER
LINDA T. COBERLY
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

TIM C. HOLLEMAN
Boyce Holleman & Associates
11240 Hwy 49 N.,
Ste. 400-D
Gulfport, MS 39503
(228) 539-6000

W. F. HOLDER II
400 East Railroad St.
Long Beach, MS 39560
228-863-4999

Counsel for Petitioners

SEPTEMBER 2008

APPENDIX

HABITABILITY OF LOTS SUBJECT TO MAIL FRAUD CLAIMS

Lot	Original Owner	Purchased	Inhabited At Trial? (2005)	Transcript Cites
YY-12	Karen Reynolds	1999	Yes	429, 434-36, 449
AG-11	Jacqueline Peterson	1999	Yes	579-80, 595-96
KK-5	Nancy Watford	1998	No, but owner lived there until 2002, and no evidence tied the vacancy to habitability issues. Watford reaffirmed her lot debt in bankruptcy.	617-18, 645; 653
E-13	Patrick Brossett, Sr.	1997	Yes	2631-33; 2641
II-3 & II-2	Joseph Grayson	1997	Yes, and owner purchased a second lot.	1088-89; 1163-64; 1178-79
G-2B	Norris Jones	1998	Yes	1357, 1363-66
AA-17	Richard Wenniger	1998	Yes	1508, 1510, 1526, 1546, 1566-67
U-15	Phillip Johnson	1998	Yes	2756-58
U-15	Becky Anderson	2004	Yes	2892
AM-6	Dawn McNiece	2000	Yes	Sent. TR 115
M-6	Ruth Hayes	1997	Yes	1582
V-6	Christa Spence	1997	Yes	1745; 1753
O-1	Gwynn Spiers	1997	Yes. Current resident testified she had no problems with the lot or septic system.	1773-74; 1781-82; 4105-06
NN-9	Dee Micele	1998	Yes	1916; 1922; 1949

APPENDIX A

Lot	Original Owner	Purchased	Inhabited At Trial? (2005)	Transcript Cites
YY-15	Allen Patterson	1998	Yes	2461; 2487
GG-4	Patricia Griswold	1999	No. Owner lived there until 2004, and no evidence tied the vacancy to habitability. Griswold also reaffirmed her lot debt in bankruptcy.	2502-03; 2549
AF-18	Eleanor Johnson	1999	No. Owner's trailer was repossessed in 2003. No evidence tied the vacancy to habitability.	3729- 3305-06
LL-3	Steve Martin	2000	No. Owner was transferred by the Navy in 2003, and he rented out the property until August 2004. The lot was on sale at the time of trial. No evidence tied the vacancy to habitability issues.	3476; 3487; 4311-4312
YY-1 & YY-2	Henry Johnson	1999	No. Original owner moved in 2003, and renter lived there until owner evicted him before trial for failure to pay rent. No evidence tied the vacancy to habitability.	3729; 3305-06
AG-5	Dawn Sullivan	2000	Yes	3597-98; 617-18
JJ-6	Connie Taylor	2000	Yes	3725-26; 3772-73